Office of the Attorney General
State of Texas

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Mr. Leonard W. Peck, Jr.
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P.O. Box 99
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Open Records Decision No. 641

Re: Whether information concerning disabilities and related health information about TDCJ employees is excepted from public disclosure under the Texas Open Records Act in conjunction with the federal Americans with Disabilities Act of 1990 (RQ-753)

Dear Mr. Peck:

The Texas Department of Criminal Justice (the "TDCJ") received a request under the Texas Open Records Act, Government Code chapter 552, for certain records about job applicants and employees. You contend that two of the requested records, an ADA position questionnaire and a self-identification of reportable handicap form, are protected from disclosure pursuant to the provisions of title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*

Chapter 552 of the Government Code provides that all information collected, assembled or maintained by a governmental body such as TDCJ in connection with the transaction of official business is subject to public disclosure unless otherwise excepted from disclosure. Gov't Code §§ 552.003 (definition of governmental body), .006 (information is public except as expressly provided by Gov't Code ch. 552), .022 (definition of public information). Information is excepted from public disclosure pursuant to section 552.101 if it is "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information is confidential by law when it is made confidential by federal statute or administrative regulations enacted pursuant to statutory authority. Open Records Decision No. 476 (1987) at 5. If the records at issue are confidential under section 552.101 in conjunction with title I of the ADA, the records may be released only in accordance with provisions of that federal law. *Id.*

A review of the ADA provisions may be helpful in considering whether these records are confidential. The stated purpose of the ADA is to eliminate what Congress found to be widespread discrimination against individuals with physical or mental disabilities, who historically

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7); *see id.* § 12101(b). The ADA has four separate titles that (1) prohibit employment discrimination, (2) mandate accessibility to services offered by state and local governments, (3) provide that businesses open to the public make facilities accessible and provide reasonable accommodation for persons with disabilities, and (4) ensure that telephone companies provide non-voice services for individuals with hearing or speaking disabilities. *Id.* § 12101 *et seq.* [1]

Title I prohibits discrimination in employment and limits the extent to which an employer subject to the ADA may require applicants and employees to provide information concerning disabilities.[2] We note that the United States Equal Employment Opportunity Commission (the "EEOC") has, pursuant to its statutory authority, *see*

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[1]For purposes of the ADA, a person with a disability is an individual who has:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> (B) a record of such an impairment; or
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> (C) [is] regarded as having such an impairment.

42 U.S.C. § 12102(2). "Major life activities" include activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). A physical or mental impairment "substantially limits" an individual when he or she is unable to perform a major life activity that the average person could perform or if there is significant restriction in the condition, manner, or duration under which the individual can perform a major life activity when compared to the average person. *Id.* § 1630.2(j)(1). Short-term, non-chronic impairments that generally have no permanent impact, such as influenza, are not covered under the ADA. *Id.* pt. 1630 app. at 402 (1995) (section 1630.2(j) Substantially Limits).

[2]The ADA does not preempt federal, state, or local law providing greater or equivalent protection than that granted under the ADA. *Id.* § 1630.1(c); *see id.* pt. 1630 app. at 400 (1995) (section 1630.1(b) and (c) Applicability and Construction). Individuals who have been discriminated against may pursue an ADA claim in addition to any applicable state claim. *Id.* pt. 1630 app. at 400 (1995) (section 1630.1(b) and (c) Applicability and Construction). Section 21.051 of the Texas Labor Code prohibits employment discrimination based on an individual's disability.

42 U.S.C. § 12116, promulgated regulations to provide guidance in interpreting title I of the ADA, *see* 29 C.F.R. pt. 1630. This office has previously relied upon the EEOC regulations in construing title I of the ADA. Attorney General Opinion DM-124 (1992).

The ADA prohibits discrimination

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). A "qualified individual with a disability" is one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).[3] The section 12112(a) prohibition against discrimination includes restrictions as to the use and disclosure of medical examinations and medical inquiries. *Id.* § 12112(d)(1). These restrictions vary depending on whether an applicant is in the job application phase, the conditional job offer phase, or has been hired as an employee. *Id.* § 12112 (d)(2)-(4).

During the job application phase, when an individual is applying for a job before a job offer is made and accepted, an employer generally is prohibited from requiring an applicant to undergo a medical examination or to answer medical inquiries:

> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

Id. § 12112(d)(2)(A). These restrictions include not asking an applicant if he or she is disabled or about the nature and severity of the disability when the applicant appears to be disabled.[4] 29 C.F.R. pt. 1630 app. at 417 (1995) (section 1630.14 Medical Examinations and Inquiries Specifically Permitted). An employer is also prohibited from using an application form that lists potentially disabling medical conditions and requires the applicant to check off applicable medical conditions. *Id.* at 418. However, employers are not prohibited from making inquiries or collecting information about disabilities

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[3]The essential functions of a job do not include marginal functions that an employee might perform but that are not essential to job performance. 29 C.F.R. § 1630.2(n)(1).

[4]The EEOC regulations make clear that it would be appropriate for an employer to ask disability-neutral questions. For example, if a position required a driver's license an employer may ask applicants if they have a valid license, even if this excludes individuals with certain visual disabilities. However, an employer may not ask an applicant if he has such a visual disability.

in order to satisfy the affirmative action requirements of subchapter V of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 791 *et seq.*, or other state or federal law providing for such affirmative action.[5] 29 C.F.R. § 1630.1.

The conditional job offer phase occurs when an applicant has been selected and a job offer is made to that applicant and accepted:

> A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--
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> (A) all entering employees are subjected to such an examination regardless of disability.

42 U.S.C. § 12112(d)(3). The job offer may be conditional on the outcome of a medical examination or the answer to a medical inquiry. Although section 12112(d)(3), quoted in part above, appears to address only medical examinations and information obtained from those examinations, the regulations adopted to implement the ADA employment provisions make clear that the statute addresses *both* medical examinations and medical condition or history information obtained from medical inquiries:

> (b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.[6]

29 C.F.R. § 1630.14(b). Thus, at the conditional job offer phase medical condition and history information may be collected on an applicant.[7]

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[5]Section 791(c) of the Rehabilitation Act concerns state agencies' hiring of individuals with disabilities who have received rehabilitation services under a state vocational rehabilitation program, veteran's program, or other programs. Section 793 concerns affirmative action requirements for federal contractors. Section 794 concerns equal access to federal programs and activities.

[6]The regulations also make clear that a business may require all entering employees in the same *job category* to undergo medical examinations or inquiries, but a business is not obligated to require all other entering employees to undergo examinations or inquiries.

[7]However, information obtained from a required examination or inquiry may not be used as a basis for discriminating against an otherwise qualified individual. *See* 42 U.S.C. § 12112(b)(6). When an individual with disabilities is excluded from employment as a result of a medical examination or inquiry,

There are somewhat different requirements concerning medical examinations and medical inquiries for those who are already employed:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A). An employer may require employees to undergo medical examinations or answer inquiries only if these requirements are job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c).[8] In addition, an employer may conduct medical examinations and solicit medical information when employees participate in a *voluntary* employee health program available to employees at the work site. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).[9] An employer also may validly obtain medical information when required for certain insurance or employee benefit plan purposes. 42 U.S.C. § 12201(c). The ADA also does not prohibit employers from collecting medical information in compliance with state workers compensation laws that do not conflict with ADA provisions. 29 C.F.R. pt. 1630. app. at 419 (1995) (section 1630.14(b) Employment Entrance Examination); *see* Attorney General Opinion DM-124 (1992) at 7-8 (if conflict exists, ADA preempts Texas Worker's Compensation Act).

In sum, title I of the ADA generally prohibits employers from collecting medical information and medical histories about applicants prior to the job offer phase. The ADA requirements do not prohibit employers from collecting medical information and medical histories on employees and applicants at the conditional job offer phase. However, there are specific requirements about how such information must be collected, held, and under what circumstances it may be released.

(Footnote continued)

the criteria used to exclude the individual must have been job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3). Additionally, the employer must determine that the applicant could not have performed the essential job functions even with a reasonable accommodation. *Id.*

[8]For example, when federal regulations require employees in certain types of jobs to undergo periodic medical testing, employers may require employees in these positions to submit to the tests because the requirement is job-related and consistent with business necessity. *Id.* pt. 1630 app. at 419 (1995) (section 1630.14(c) Examination of Employees). An employer may, without violating the ADA, ask an employee about his or her ability to perform essential job functions. *Id.*

[9]This might include voluntary on-site programs such as high blood pressure screening, early cancer detection programs, and weight control counseling for employees. *Id.* (section 1630.14(d) Other Acceptable Examinations and Inquiries).

Title I of the ADA and the EEOC regulations adopted pursuant to specific statutory authority provide for the confidentiality of medical condition and history information collected from applicants and employees. Section 12112(d)(3)(B) of the ADA provides that "medical condition or history" information collected on applicants after an employment offer is made and accepted must be "collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record." *See also* 29 C.F.R. § 1630.14(b)(1) (providing that information "*shall* be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record") (emphasis added). Section 12112(d)(4)(C) provides that information "regarding the medical condition or history of any employee" obtained as part of a work-site based health program also must be maintained on separate forms, in separate files, and be kept confidential. *See also* 29 C.F.R. § 1630.14(d)(1) (providing that this information "*shall* be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record") (emphasis added). As to information obtained from employees' job-related medical examinations or medical inquiries, the interpretive rules make clear that medical condition and medical history information so obtained is subject to the same restrictions:

> (c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.
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> (1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record . . . .

Id. § 1630.14.

The ADA allows certain types of medical information to be disclosed in order to ensure safety, proper accommodation of employees' disabilities, and compliance with ADA provisions. Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical condition or medical history may be disclosed as follows:

> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
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> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

> (iii) government officials investigating compliance with this Act shall be provided relevant information on request.

Although section 12112(d)(3)(B) specifically addresses information obtained from applicants at the conditional job offer phase, these restrictions also are applicable to information about medical conditions and medical histories obtained from employees. 29 C.F.R. § 1630.14(c)(i)(i)-(iii). Furthermore, section 12112(d)(4)(C) provides that information about medical conditions and medical histories obtained from employees participating in a voluntary, site-based employee health program are subject to the same disclosure requirements.

You submitted to this office for review the ADA position questionnaire and the self-identification of reportable handicap form. We understand that the ADA position questionnaire is filled out by applicants after a conditional offer of employment has been made. It lists a number of types of medical conditions, including paralysis, heart disease, and cancer, that an applicant may check off as applicable. We assume that the self-identification of reportable handicap form is also filled out after an offer of employment is made and accepted.[10] The form allows an applicant to identify a disability and to detail whether and what type of accommodation would be needed. Both of the forms at issue seek information about an individual's medical history and medical condition.[11]

TDCJ, an employer subject to title I of the ADA, *see* 42 U.S.C. § 12111(5), collects and maintains the records at issue. An individual filling out either the ADA position questionnaire or the self-identification of reportable handicap form is providing information about his or her medical condition and medical history. The ADA provides that information about medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as confidential medical records. Since the information on these forms is made confidential under section 12112(d) of the ADA, it may be released only as provided under that section.[12]

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[10]You have not indicated that this information is being collected pursuant to federal regulations under the Rehabilitation Act, which allow collection of information about disabilities at the application stage. *Id.* § 1630.1. We note that the Rehabilitation Act provides for consistency with ADA standards. *See* 29 U.S.C. §§ 791(g) (providing that standards used to determine employment discrimination are same as ADA employment provisions), 793(e) (providing that complaints be dealt with in manner that prevents imposition of conflicting standards under Rehabilitation Act and ADA), 794(d) (providing that standards for employment discrimination are same as ADA employment provisions).

[11]The information at issue was collected from applicants, some of whom are TDCJ employees, so that the information at issue concerns both applicants and former or current employees.

[12]This opinion does not address the confidentiality of medical records under state law. It also does not address the confidentiality of information collected prior to the effective date of the ADA or information collected outside the scope of the ADA provisions.

SUMMARY

Information collected under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, from an applicant or employee concerning that individual's medical condition and medical history is confidential under section 552.101 of the Government Code, in conjunction with provisions of the Americans with Disabilities Act. This type of information must be collected and maintained separate from other information and may be released only as provided by the Americans with Disabilities Act.

Yours very truly,

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